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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

XOCHITL HERNANDEZ, CESAR
 MATIAS, for themselves and on behalf
 of a class of similarly-situated
 individuals,

Plaintiffs-Petitioners,

v.

LORETTA LYNCH, U.S. Attorney
 General, JUAN P. OSUNA, Director,
 Executive Office for Immigration
 Review, JEH JOHNSON, Secretary,
 Department of Homeland Security,
 SARAH R. SALDANA, Director,
 Immigration and Customs Enforcement
 (ICE), DAVID JENNINGS, Field
 Office Director, Los Angeles Field
 Office of ICE, JAMES JANECKA,
 Warden, Adelanto Detention Facility;
 CHRISTINA HOLLAND, Jail
 Administrator, Santa Ana City Jail,
 CARLOS ROJA, Chief, Santa Ana
 City Department, JON BRIGGS,
 Captain, Orange County Sheriff's
 Department (OCSD), MIKE
 KRUEGER, Captain, OCSD,
 SANDRA HUTCHENS, Sheriff,
 Orange County, in their official
 capacity only,

Defendants-Respondents.

Case No. 16-620-JGB-KK

**PLAINTIFFS' RESPONSE TO
 DEFENDANTS' STATUS
 REPORT REGARDING
 PLAINTIFF XOCHITL
 HERNANDEZ**

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1 On September 10, 2016, Defendants submitted a “status report” advising the
 2 Court of Plaintiff Xochitl Hernandez’s release from custody following a bond
 3 hearing. *See* Dkt. 78. Plaintiffs submit this brief response to provide additional
 4 information concerning the bond hearing and Ms. Hernandez’s release, and to advise
 5 the Court of the federal government’s recent filing of an amicus brief in *Walker v.*
 6 *City of Calhoun*, Case No. 16-10521 (11th Cir. Aug. 18, 2016), in which the
 7 government argued, like Plaintiffs here, that a pre-trial bail system that does not take
 8 into account an incarcerated individual’s ability to pay is unconstitutional.

9 On August 23, 2016, Ms. Hernandez had a Section 1226(a) bond hearing
 10 pursuant to *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). Thereafter, the
 11 Immigration Judge (“IJ”) issued a written decision granting Ms. Hernandez release
 12 on a \$5,000 bond and enrollment in an “alternatives to detention” (“ATD”) program.
 13 *See* Kaufman Decl. Ex A (IJ decision). Nothing during the hearing nor in the
 14 decision indicates that the IJ considered Ms. Hernandez’s ability to pay in setting the
 15 conditions of her release. *Id.* This was so even though Ms. Hernandez testified that
 16 she and her family have few financial resources and that her children must dedicate
 17 their meager earnings to support themselves and their own children, and indicated
 18 that her family could afford at most a \$1,500 bond. *See* Kaufman Decl. ¶ 2.¹

19 After the IJ set Ms. Hernandez’s bond without regard to her ability to pay, a
 20 nonprofit organization came forward and launched a fundraising campaign on her
 21 behalf. *See* Kaufman Decl. ¶ 4. The nonprofit organization that conducted the
 22 fundraiser only learned of Ms. Hernandez’s plight after the filing of this lawsuit. But
 23 for this nonprofit coming to her rescue, Ms. Hernandez would have remained locked
 24

25 ¹ The IJ’s decision is therefore consistent with Defendants’ class-wide policy
 26 or practice of not requiring immigration officials to consider ability to pay in setting
 27 an immigration detainee’s bond amount. *See* Plaintiffs’ Motion for Class
 28 Certification, Dkt. 24 at 12-15. Although the IJ ordered Ms. Hernandez released on
 an ATD program, as Plaintiffs previously explained, *Rodriguez* requires
 consideration of ATDs—unlike Defendants’ policy or practice for Section 1226(a)
 bond hearings conducted at the outset of a detainee’s case. *See id.* at 5 n.3.

1 up on an unaffordable bond with no end to her detention in sight, despite the fact that
 2 two immigration judges each concluded at separate bond hearings that she does not
 3 present a danger to the community or a level of flight risk warranting her detention.²

4 Defendants assert that, as a result of Ms. Hernandez's release, "Plaintiffs have
 5 not identified any individuals in this litigation who have been unable to obtain their
 6 release on bond due to a lack of an ability to pay." Dkt. 78 at 1. This is blatantly
 7 false. Both named Plaintiffs in this case were incarcerated for lengthy periods due to
 8 their inability to pay their bonds: Ms. Hernandez had been detained for more than six
 9 months on a \$60,000 bond she could not afford, and Mr. Matias was detained for
 10 *more than three and half years* on a \$3,000 bond he could not pay. Additionally,
 11 Plaintiffs submitted un rebutted evidence that Defendants have a policy or practice of
 12 failing to require that immigration officials consider ability to pay at custody
 13 determinations, that there are *currently* approximately 119 people in the Central
 14 District who have bonds set yet remain detained, and identified *additional*
 15 individuals—besides Ms. Hernandez and Mr. Matias—who were detained in the past
 16 on bonds they could not pay. *See* Plaintiffs' Motion for Class Certification, Dkt. 24
 17 at 12-15 (citing to declarations by immigration practitioners, immigration court
 18 decisions, and government data). Defendants, by contrast, have introduced *no*
 19 competent evidence to support their claims that the government considered ability to
 20 pay in Ms. Hernandez's or Mr. Matias's case, or any other putative class member's
 21 case. Accordingly, the government has left *wholly un rebutted* Plaintiffs' evidence
 22 that the government has a policy or pattern of not considering ability to pay when
 23 setting bond amounts for immigration detainees under § 1226(a).

24 The Court should also be advised that the federal government recently filed an

25
 26 ² For the reasons in "Plaintiffs' Supplemental Brief Pursuant to July 28, 2016,
 27 Order," Ms. Hernandez's release does not moot her ability to seek injunctive relief or
 28 serve as a class representative. *See* Dkt. 73 (discussing among other cases, *County of*
Riverside v. McLaughlin, 500 U.S. 44, 51-52 (1991), *Gerstein v. Pugh*, 420 U.S. 103,
 110 n.11 (1975), and *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir.
 2011)).

1 amicus brief in the Eleventh Circuit in a case concerning the constitutionality of a
2 city's criminal bail procedures. *See* Kaufman Decl. Ex. B (Amicus Brief of United
3 States, *Walker v. City of Calhoun*, Case No. 16-10521 (11th Cir. Aug. 18, 2016).
4 Consistent with the federal government's position in *Jones v. Clanton*, No. 2:15-cv-
5 00034 (M.D. Al. Feb. 13, 2015) and its "Dear Colleague" letter to court
6 administrators, *see* Dkt. 67 at 3 n.1, the brief concludes:

7 In sum, under *Bearden* and other cases in *Griffin*'s progeny, a jurisdiction may
8 **not** use a bail system that incarcerates indigent individuals without meaningful
9 consideration of their indigence and alternative methods of assuring their
10 appearance at trial.

11 *Id.* at 21 (emphasis added). Accordingly, the government's amicus brief in *Walker*
12 confirms that the bond-setting procedures Plaintiffs seek are constitutionally required
13 in the pre-trial detention context.

14 Respectfully submitted,

15 ACLU OF SOUTHERN CALIFORNIA

16 Dated: September 12, 2016

17 By: /s/ Michael Kaufman

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19 Attorney for Plaintiffs-Petitioners
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